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Supreme Court, U.S.
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No. 85-1309

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THEODORE KOEHLER,

Petitioner,

v

JOHNNIE LEE McGHAR,

Respondent.

MOTION OF RESPONDENT JOHNNIE LEE McGHAR FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Submitted by:

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Respondent, Johnnie Lee McGhar, by his attorney, William J. Champion III, moves pursuant to Supreme Court Rule 46 for leave to proceed in forma pauperis.

In support thereof, Respondent states as follows:

1. Respondent sought and was granted leave to proceed in forma pauperis in the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit, the courts below.

2. The undersigned counsel, a member of the bar of this Court, was appointed by the United States Court of Appeals for the Sixth Circuit to represent the interests of Respondent under the provisions of the Criminal Justice Act of 1964, as amended.

Respectfully submitted,

WILLIAM J. CHAMPION III *
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THEODORE KOEHLER,

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JOHNNIE LEE McGHAR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Submitted by:

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QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT A REASONABLE JUROR MAY HAVE APPLIED UNCONSTITUTIONAL BURDEN-SHIFTING INSTRUCTIONS GIVEN AT RESPONDENT'S STATE COURT TRIAL TO BOTH COUNTS OF A TWO-COUNT INDICTMENT ARISING OUT OF THE SAME UNDERLYING ACTS, AND THAT THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

TABLE OF CONTENTS

	Page No.
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
INDEX OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
Procedural History	1
Statement of Facts	1
ARGUMENT	7
I. The Courts Below Correctly Ruled That The Jury Instructions Given At Respondent's State Court Trial Violated The Fourteenth Amendment To The United States Constitution Under Sandstrom v Montana, 444 U.S. 510 (1979).	7
II. The Court Of Appeals Properly Held That Petitioner Failed To Demonstrate That The Unconstitutional Jury Instructions Were Harmless Beyond a Reasonable Doubt	11
CONCLUSION AND RELIEF REQUESTED	15

INDEX OF AUTHORITIES

Cases	Page No(s).
Chapman v California 386 U.S. 18 (1967)	12
Connecticut v Johnson 460 U.S. 73 (1983)	9,12,14
Davis v Kemp ___ U.S. ___, 105 S.Ct. 2690, 86 L.Ed. 2d 707 (1985)	12
Engle v Koehler 707 F.2d 241 (6th Cir. 1983)	12,13,14
Francis v Franklin 471 U.S. ___, 105 S.Ct. 1965, 85 L.Ed. 2d 344 (1985)	11,12,13
Frazier v Cupp 394 U.S. 731 (1969)	11
In re Hamilton 721 F.2d 1189 (9th Cir. 1983)	13
McGhar v Koehler No. 81-73659 (E.D. Mich.)	2,3,9,10,1
McGhar v Koehler No. 82-16128 (6th Cir. Mar. 5, 1984)	2,3,4
McGhar v Koehler No. 85-1177 (6th Cir. Nov. 8, 1985)	3,11,13,15
People v McGhar Washtenaw County Circuit Court No. 74-8639	4
People v McGhar No. 25003 (Mich. App. Jan. 18, 1972)	1
People v McGhar No. 59737 (Mich. Sept. 1, 1977)	2
People v McGhar 411 Mich. 989 (1981)	2
People v McGhar No. 50851 (Mich. App. Oct. 22, 1980)	2
People v Wright 408 Mich. 1 (1980)	8
Sandstrom v Montana 442 U.S. 510 (1979)	7,11,12
State v Sandstrom 184 Mont. 391 (1979)	12
United States v Martin Linen Supply Company 430 U.S. 564 (1977)	9
In re Winship 397 U.S. 358 (1970)	7

Statutes and Court Rules — **Page No(s).**

Mich. Comp. Laws §750.83
(Mich. Stat. Ann. §28.278)..... 1

Mich. Comp. Laws §750.397
(Mich. Stat. Ann. §28.629)..... 1

28 U.S.C. §2254..... 2

F.R.Civ.P. 54(b)..... 3

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

I.

Procedural History

On April 22, 1975, Respondent, Johnnie Lee McGhar, a/k/a "Tripper" was convicted of assault with intent to murder and mayhem in violation of Mich. Comp. Laws §750.83, (Mich. Stat. Ann. §28.278) and Mich. Comp. Laws §750.397, (Mich. Stat. Ann. §28.629), respectively, after a trial by jury in the Washtenaw County, Michigan Circuit Court. He was sentenced to life imprisonment on the charge of assault with intent to murder. On the charge of mayhem, McGhar received a sentence of six and one-half (6 1/2) to ten (10) years imprisonment.

McGhar's convictions were affirmed by the Michigan Court of Appeals. People v McGhar, No. 25003 (Mich. App.

Jan. 18, 1972)(per curiam). The Michigan Supreme Court denied leave to appeal. People v McGhar, No. 59737 (Mich. Sep. 1, 1977).

On March 27, 1980, McGhar filed an Application for Delayed Appeal to the Michigan Court of Appeals. Leave to appeal was denied in an unpublished order for "lack of merit in the grounds presented." People v McGhar, No. 50851 (Mich. App. Oct. 22, 1980). McGhar's application for leave to appeal to the Michigan Supreme Court was also denied. People v McGhar, 411 Mich. 989 (1981).

After exhausting his state remedies, McGhar filed an Application for Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan, 28 U.S.C. §2254. By Memorandum Opinion and Order dated August 10, 1982, the district court denied McGhar's petition on procedural grounds. McGhar v Koehler, No. 81-73659 (E.D. Mich. Aug. 10, 1982).

McGhar appealed the district court's order to the United States Court of Appeals for the Sixth Circuit. In an unpublished per curiam opinion, the court of appeals reversed the decision of the district court and remanded the cause for consideration on the merits. McGhar v Koehler, No. 82-16128 (6th Cir. Mar. 5, 1984).

On remand, McGhar filed a motion for partial summary judgment, seeking habeas relief. On September 21, 1984, the district court issued a Memorandum Opinion and Order granting McGhar's motion for partial summary judgment. McGhar v Koehler, No. 81-73659 (E.D. Mich. Sept. 11, 1984).

On December 11, 1984, the district court entered an Order Conditionally Granting Petition for Writ of Habeas Corpus and a Judgment, in accordance with its memorandum opinion and order of September 21, 1984. McGhar v Koehler, No. 81-73659

(E.D. Mich. Aug. 10, 1982).

McGhar appealed the district court's order to the United States Court of Appeals for the Sixth Circuit. In an unpublished per curiam opinion, the court of appeals reversed the decision of the district court and remanded the cause for consideration on the merits. McGhar v Koehler, No. 82-16128 (6th Cir. Mar. 5, 1984).

On remand, McGhar filed a motion for partial summary judgment, seeking habeas relief. On September 21, 1984, the district court issued a Memorandum Opinion and Order granting McGhar's motion for partial summary judgment. McGhar v Koehler, No. 81-73659 (E.D. Mich. Sept. 11, 1984).

On December 11, 1984, the district court entered an Order Conditionally Granting Petition for Writ of Habeas Corpus and a Judgment, in accordance with its memorandum opinion and order of September 21, 1984. McGhar v Koehler, No. 81-73659 (E.D. Mich. Dec. 11, 1984). On December 21, 1984, the district court entered an order, pursuant to F.R.Civ.P. 54(b) directing the entry of final judgment in accordance with the judgment and order of December 11, 1984.

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed. McGhar v Koehler, No. 85-1177 (6th Cir. Nov. 8, 1985).

On January 31, 1986, Petitioner filed a Petition for Writ of Certiorari to the United States Court of Appeals of the Sixth Circuit, seeking review of the November 8, 1985 decision of the court of appeals.

Statement Of Facts

The facts underlying McGhar's convictions were cogently summarized by the Court of Appeals in its per curiam opinion of March 5, 1984.

> The facts of this case present a rather bizarre incident. On May 12, 1974, Robert Bennet entered the Flame Bar in Ann Arbor, Michigan. Inside the bar he recognized a friend, Larry Katz, who was seated with McGhar and joined them. They remained in the bar until about 1:30 a.m. when the group, now joined by a friend of McGhar's, parted for Bennet's apartment. After pizza and two six-packs of beer the party seemed to get a little out of hand. First, McGhar's friend was removed because it was suspected that he had taken something from Bennet's bedroom. McGhar then removed from the wall a Samurai sword and threatened Katz. Despite this behavior, Bennet apparently agreed to let him [McGhar] stay with him because McGhar had no place to go. Around 4:30 - 5:00 a.m. Katz was ready to give up the ghost and asked Bennet to drive him home. McGhar joined them for the ride. About 45 minutes later, after returning to the apartment and following an animated conversation, McGhar struck Bennet in the mouth with his fist, breaking several teeth. McGhar then pulled the Samari sword from the wall and began slashing Bennet. This continued for some 45 minutes until McGhar went hopping up the steps leaving Bennet bleeding from a large number of fairly serious wounds.

McGhar v Koehler, No. 82-16128, op. at 2 (6th Cir. Mar. 5, 1984).

Robert Bennet testified at trial that he joined McGhar, whom he knew as "Tripper", at the Flame Bar in Ann Arbor (Tr. 48-49).[1] Bennet sat at McGhar's table and drank alcohol for approximately one to one and one-half (1 to 1 1/2) hours (Tr. 48). During this time, Bennet had five whiskeys (Tr. 54). Bennet described himself as intoxicated (Tr. 59), and recalled that McGhar was drinking as well (Tr. 59).

After leaving the bar, the group purchased a pizza and two six packs of beer. They then went to an apartment where Bennet was staying (Tr. 55). At some point during the evening, Bennet "started to become worried about [McGhar's] behavior." (Tr. 62-63). Bennet testified that McGhar picked up a Samurai sword and "was sort of flailing away at Mr. Katz'

---

1. The symbol "Tr." refers to the transcript of proceedings held in People v Johnnie Lee McGhar, Washtenaw County Circuit Court No. 74-8639 (April 21-22, 1975).

feet." (Tr. 51). Later in the evening, after Mr. Katz had left the apartment, Bennet noted a marked change in McGhar's behavior which led him to believe that McGhar had taken some drugs (Tr. 65). McGhar "started to act what I thought in a sort of aggressive, bizarre way, fooling around in the kitchen, and he was making something and tried to put some of it in my face." (Tr. 51). Bennet saw McGhar using kitchen utensils in an unusual fashion, attempting to make a "pancake" out of dough and water (Tr. 65-66). He felt "something definitely seemed to be wrong with [McGhar] after awhile and I just didn't know what it was. We hadn't--hadn't been arguing or didn't seem to be any reason for him to be angry." (Tr. 65).

McGhar became involved in an animated conversation with Bennet in the apartment's bedroom, which culminated in the attack on Mr. Bennet (Tr. 67-69).

McGhar did not testify at his trial, nor were any witnesses called on his behalf. In his opening statement, McGhar's court-appointed counsel conceded that McGhar had committed the act which caused the serious injuries to Mr. Bennet (Tr. 45). The defense steadfastly maintained, however, that McGhar lacked the specific intent required to commit the crimes charged.

In his opening statement, defense counsel stated "... the defendant is not guilty of the charge of assault with intent to commit murder. The crux of this crime is the intent. It is that element which will be the central focus, I submit to you, of this case." (Tr. 45-46). The defense theory was that

> [T]he incident which led to these injuries came after a night of drinking on top of a dose of halluciginic [sic] drugs. The evidence will show, as grim as it may sound, had the defendant wanted to kill Robert Bennett he had ample opportunity to do so."

(Tr. 46).

The "central issue", if not the only issue, at McGhar's trial was his intent on the morning of March 13, 1974 (Tr. 47).

In his closing argument, defendant's counsel reiterated the defense theory.

> [T]he question before you is one of intent. Did John McGhar assault Robert Bennett with the intent to murder him.
>
> The defense submits that the evidence offered to you in this case does not establish that intent on the part of John McGhar beyond a reasonable doubt.
>
> * * *
>
> Mr. McGhar as the result of intoxication and drugs was beserk, with no state of mind, with no intent.

(Tr. 125, 126)

Without conceding any mens rea, defense counsel argued, in the alternative, that if "McGhar had any intent whatsoever that that intent was to do what he did, which was to cause great bodily harm." (Tr. 128).

Against this factual backdrop, the trial court charged the jury, in relevant part, as follows:

> The question of intent is one that it is hard to establish directly because grown persons do not always disclose the object they have in view in any acts in which they may indulge and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it, but in connection with all of this unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural, probable and legitimate consequences of his acts.
>
> The intent may be inferred from the doing of a wrongful or illegal act, but this inference is not necessarily conclusive. The law presumes that every man intends the legitimate consequences of his own act. Wrongful acts knowingly or intentionally committed, can neither be justified nor excused on the ground of innocent intent.
>
> * * *
>
> The fact that a criminal act is willfully done with an innocent or laudable motive will not excuse it. When an act is defined by law to be an illegal

> and criminal [sic] everyone is punishable who does the prohibited act without some legal justification or excuse furnished by the action and the circumstances without regard to his real motive and intention.

(Tr. 138-139) (emphasis added).

After giving these instructions, the trial court instructed the jury on the theories of the parties, the presumption of innocence and the state's burden of proof (Tr. 138-141).

The jury returned verdicts of guilty as charged on both counts.

ARGUMENT

I.

The Courts Below Correctly Ruled That The Jury Instructions Given At McGhar's State Court Trial Violated His Rights Under The Fourteenth Amendment To The United States Constitution.

In Sandstrom v Montana, 442 U.S. 510, 512 (1979), the court declared unconstitutional a jury instruction that "the law presumes that a man intends the ordinary consequences of his voluntary acts." The court held that reasonable jurors could have given the presumption either conclusive or burden-shifting effect, thus unconstitutionally relieving the prosecution of its burden of proof on an essential element of the crime charged. In re Winship, 397 U.S. 358 (1970).

The trial court's charge in the instant case was virtually identical to that condemned by the Court in Sandstrom. The trial judge charged the jury that "the law presumes that every man intends the legitimate consequences of his own acts." (Tr. 138).

The trial court then compounded its instructional error when it charged the jury that:

> [U]nless the testimony satisfies you of something else, you are warranted in holding a party responsible

> for the natural, probable and legitimate consequences of his acts.

(Tr. 138) (emphasis added).

In a well-reasoned opinion, the Michigan Supreme Court held that a virtually identical instruction unconstitutionally shifted the burden of proof on the issue of intent.

> We are convinced that by instructing the jury that "unless the testimony satisfies you of something else", the trial court created the prospect that the jury "may have interpreted the judge's instructions as ... a burden-shifting presumption", Sandstrom, supra, p. 524, and the instruction is therefore unconstitutional.

People v Wright, 408 Mich. 1 (1980).

The trial court's instructional error was further compounded when it charged the jury that "intent may be inferred from the doing of a wrongful, fraudulent or illegal act, but this inference is not necessarily conclusive (Tr. 138) (emphasis added). As the Michigan Supreme Court held in Wright:

> Besides injecting the unexplained notion that the instruction describes an inference (which can never be conclusive), the language suggests that there are cases where the presumption is conclusive. Moreover, the jury was not told whether this case was "necessarily" one of them.

Id., at 20.

Further compounding its error, the trial court charged the jury that "wrongful acts knowingly or intentionally committed can neither be justified or excused on the grounds of innocent intent." (Tr. 138) (emphasis added). Upon listening to this instruction, a conscientious juror may very well have believed that if McGhar committed a "wrongful act", his intent was simply irrelevant. An identical instruction was held to be unconstitutional by the Michigan Supreme Court in People v Wright, 408 Mich. 1 (1980).

Lastly, the court instructed the jury that:

> When an act is defined by law to be an illegal and criminal [sic], everyone is punishable who does the prohibited act without some legal justification

> or excuse furnished by the action and the circumstances without regard to his real motive and intention.

(Tr. 139) (emphasis added).

As the district court noted, this instruction "arguably removed the issue of intent from the jury's consideration." McGhar v Koehler, No. 81-73659, mem. op., at 14 (E.D. Mich. Aug. 10, 1983). In no uncertain terms, the trial court instructed the jury that McGhar's "real intention" was simply not an issue. As such, the instruction totally relieved the prosecution of its burden of proof on an essential element of both crimes charged, and was the functional equivalent of a directed verdict on the issue of intent. Accord, Connecticut v Johnson, 460 U.S. 73, 84 (1983). No matter how overwhelming the evidence, a trial court is not free to direct a verdict in favor of the state on an essential element of crime. United States v Martin Linen Supply Company, 430 U.S. 564 (1977).

Whether any individual instruction, viewed in isolation, sufficiently tainted the proceedings to warrant habeas relief, the court of appeals correctly held that the cumulative effect of the instructions was to relieve the prosecution of its burden of proof on the only disputed issue at trial, John McGhar's intent.

Petitioner's contention that the unconstitutional instructions tainted only the mayhem charge and not the assault with intent to murder charge is disingenuous at best. Petitioner apparently feels that since the unconstitutional instructions on intent followed the trial judge's instructions defining mayhem, the jury would not follow these instructions with respect to the assault charge. A review of the internal structure of the trial court's charge demonstrates that the intent instructions were intended to apply to both counts of the indictment.

After his introductory comments, the trial court instructed the jury on the elements of assault with intent to commit murder, including the specific intent required to support a conviction on the charge (Tr. 133-137). The court then instructed the jury on the elements of mayhem (Tr. 137-138). Following these instructions, the court gave the lengthy and erroneous instructions on the only disputed issue in the trial, an issue common to both counts: the defendant's specific intent (Tr. 138-139).[2/]

Nowhere in the court's charge is there any indication that the burden-shifting instructions on intent were applicable only to one count or another. In fact, immediately following the burden-shifting instructions, the court instructed the jury on the state's theory with respect to the assault charge (Tr. 139-140).

In defining the charge of assault with intent to murder, the trial court instructed the jury on the degree of intent required to support a conviction (Tr. 135). In the challenged instructions, the trial court instructed the jury on the manner in which such intent could be deemed proven. As such, "the jury could easily, and may well have applied the explanatory instructions to both counts." McGhar v Koehler, No. 81-73659, mem. op., at 8, n. 2 (E.D. Mich., Sept. 21, 1984).

Even assuming, arguendo, that the trial court intended the erroneous instructions to be applicable only to the mayhem charge, the trial court's intent was not adequately communicated to the jury. It would be illogical to assume that the jury utilized the burden-shifting instructions on intent to arrive

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2. In the district court, petitioner contended that "intent was not an issue regarding mayhem." (Brief in Opposition to Motion for Partial Summary Judgment, p. 19). If true, there would seem to be little reason to give detailed instructions on intent with respect to that charge. Petitioner has apparently abandoned this position.

at a verdict on one count, but ignored the instructions in arriving at a verdict on the other. As noted by the Court of Appeals, both charges arose out of the same underlying acts. McGhar v Koehler, No. 85-1177, op., at 2 (6th Cir. Sep. 11, 1984).

It must be presumed that jurors conscientiously follow the instructions given them. Frazier v Cupp, 394 U.S. 731, 735 (1969). It cannot be presumed, however, that jurors are able to divine what petitioner claims to be the secret intent of a trial judge in giving the instructions.

The courts below reached a conclusion not unlike that reached by the Court in Francis v Franklin, 471 U.S. ____, 105 S.Ct. 1965, 85 L.Ed. 2d 344, 358, n. 7 (1985).

> [I]t is certainly reasonable to expect a juror to attempt to make sense of a confusing earlier portion of the instruction by reference to a latter portion of the instruction.

The trial court's generally correct instructions on the state's burden of proof and the presumption of innocence did not cure the constitutional defect in its erroneous instructions. Francis v Franklin, 471 U.S. ____, 105 S.Ct. 1965, 85 L.Ed. 2d 344 (1985).

Accordingly, the court of appeals correctly held that the jury instructions violated petitioner's rights under the fourteenth amendment to the United States Constitution.

II.

Petitioner Failed To Demonstrate That The Unconstitutional Jury Instructions Were Harmless Beyond a Reasonable Doubt.

In Sandstrom v Montana, 442 U.S. 510 (1979), the Court did not reach the issue of whether burden-shifting jury instructions can ever be considered harmless beyond a reasonable doubt. Upon remand, the Montana Supreme Court vacated Sandstrom's conviction stating:

> In considering the instructions, and the fact that intent was the main issue in the district court trial, we cannot make that assertion [that the error was harmless]. The erroneous instruction goes to a vital element of the proof of the crime, namely the intent of the defendant Sandstrom in committing the homicide.

State v Sandstrom, 184 Mont. 391 (1979).

In Connecticut v Johnson, 460 U.S. 73 (1983), an equally divided court failed to provide definitive guidance as to whether a Sandstrom violation can ever be considered harmless. See also, Francis v Franklin, 471 U.S. ____, 105 S.Ct. 1965, 85 L.Ed. 2d 344 (1985); Engle v Koehler, 707 F.2d 241 (6th Cir. 1983), aff'd by an equally divided court sub nom Koehler v Engle, 464 U.S. ____, 104 S.Ct. 1673, 80 L.Ed. 2d 1 (1984); Davis v Kemp, ____ U.S. ____, 105 S.Ct. 2690; 86 L.Ed. 2d 707 (1985). A four-justice plurality of the court, with Justice Stevens concurring on the result, held that a violation of Sandstrom could never be harmless error except in exceptional circumstances, such as where intent was not a contested issue at trial. The plurality believed that a Sandstrom violation involved "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Connecticut v Johnson, 460 U.S. 73, 81 (1983), quoting, Chapman v California, 386 U.S. 18, 23 (1967).

While respondent strongly advocates the position of the plurality, it is not necessary to decide the issue left unresolved in Connecticut v Johnson in this case. Both the district court and the court of appeals "conducted a careful, harmless error inquiry and concluded the Sandstrom error at trial could not be deemed harmless." Francis v Franklin, 471 U.S. _____, 105 S.Ct. 1965, 85 L. Ed. 2d 344, 360 (1985). Questions regarding harmless error are more appropriately left to the courts below. Connecticut v Johnson, 460 U. S. 73, 102 (1983) (Powell, J, dissenting).

> The primary task of this Court upon review of a harmless error determination by the court of appeals is to insure that the court undertook a thorough inquiry and made clear the basis of its decision.

Francis v Franklin, 471 U.S. _____, 105 S.Ct. 1965, 85 L. Ed. 2d 344, 360, n. 10 (1985).

In its thorough and well-reasoned opinion, the district court held that "it is difficult, if not impossible, to conclude that the instructions given the jury in the present did not contribute to plaintiff's convictions, and therefore, are not harmless error." McGhar v Koehler, No. 81-73659, mem. op., at 14 (E.D. Mich. Sept. 21, 1984). The court of appeals agreed. McGhar v Koehler, No. 85-1177 (6th Cir. Nov. 8, 1985).

Where, as here, the sole defense is lack of mens rea, "a Sandstrom instruction can be extremely prejudicial even if over all proof of intent or malice is substantial." Engle v Koehler, 707 F.2d 241, 246 (6th Cir. 1983), aff'd by an equally divided court sub nom Koehler v Engle, 464 U.S. ____ 104 S.Ct. 1673, 80 L.Ed. 2d 1 (1984) (per curiam).

The facts in Engle are remarkably similar to those in the instant case. In Engle, the defendant admitted committing the homicide charged, but denied having the requisite mens rea to sustain a murder conviction because of the combined effects of alcohol and drug use. Under those circumstances, the court held that the burden-shifting presumption created by a Sandstrom instruction could not be considered harmless. Engle v Koehler, 707 F.2d at 248; accord, In re Hamilton, 721 F.2d 1189, 1191 (9th Cir. 1983).

While the evidence of McGhar's participation in the acts underlying the charge was substantial, and, in fact, his participation was conceded by counsel, the evidence with respect to his intent was far from overwhelming. The very bizarre and gruesome nature of the acts could create doubt as to McGhar's intent. There was evidence at trial that McGhar

had consumed substantial amounts of alcohol (Tr. 48, 54, 55, 59). The victim testified that McGhar began acting in "a bizarre way" (Tr. 51); that "something definitely seemed wrong with him after awhile (Tr. 65); that he was not acting in a normal fashion (Tr. 65-66); and that he might have been on drugs (Tr. 65). There was sufficient evidence, and Petitioner does not appear to contend otherwise, that a rational juror could have found McGhar lacked the specific intent the crimes alleged because of his consumption of alcohol and mind altering drugs.

Even if the state's circumstantial evidence on intent was strong, this Court cannot conclude that the jury was unaffected by the erroneous instructions. As the plurality noted in Connecticut v Johnson, 460 U.S. 73, 85-86 (1983)

> An erroneous presumption on a disputed element of a crime renders irrelevant the evidence of the issue because the jury may have relied upon the presumption rather than the evidence. If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming, it is then simply irrelevant.

When confronted with instructions which would permit a conviction by simply relying upon a conclusive or burden-shifting presumption on intent, once having found the conceded fact that McGhar committed the act, it is difficult to believe that the jury would have undertaken the more difficult task of evaluating conflicting evidence at arriving at a verdict independent of the unconstitutional presumption.

The fact that the trial court correctly instructed the jury on the presumption of innocence and in the state's obligation to prove each element of the crimes charged beyond a reasonable doubt, does not cure the constitutional error committed. In Engle v Koehler, 707 F.2d 241, 245 (6th Cir. 1983), the court held that:

> The instructions on the presumption of innocence and on proof beyond a reasonable doubt are not rhetorically inconsistent with the existence of a burden-shifting presumption because a reasonable juror could have regarded the presumptions on malice and intent as "a means by which proof beyond a reasonable doubt ... [omitted in original] could be satisifed.

In conducting a careful harmless error inquiry, the court of appeals correctly concluded that "because defendant's intent was a central issue in each charge, the error was not harmless beyond a reasonable doubt." McGhar v Koehler, No. 85-1177 op., at 2 (6th Cir. Nov. 8, 1985).

CONCLUSION AND RELIEF REQUESTED

Petitioner has failed to set forth any grounds for invoking the Court's discretion to review the judgment of the court of appeals on writ of certiorari. The decisions of the district court and court of appeals are in accord with decisions of other courts and this Court.

WHEREFORE, Respondent, Johnnie Lee McGhar, prays that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, or in the alternative, upon granting the Writ, affirm the decision of the Court of Appeals.

Respectfully submitted,

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Dated: February 25, 1986